

A claimant with two part-time jobs quit the one with lower pay and fewer hours to work additional hours at the second. The Board ruled that the second job was her primary employer and that the lower paying job had been subsidiary part-time work. When she was laid off from her primary employer, she was entitled to benefits, but subject to a constructive deduction for leaving subsidiary part-time work without good cause attributable to the employer.



THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
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Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny unemployment benefits following the claimant's separation from part-time employment. We review, pursuant to our authority under G.L. c. 151A, § 41. We reverse the outright denial of benefits based on the claimant's separation from this employer. However, we apply a constructive deduction to benefits to which the claimant otherwise may be entitled to because of her subsequent separation from her other, primary employer.

The claimant was separated from employment on January 17, 2008. She filed a claim for unemployment benefits with the DUA that was granted in a determination issued by the agency on February 25, 2009. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, a DUA review examiner overturned the agency's initial determination and denied the claimant benefits in a decision rendered on March 31, 2009.

Benefits were denied after the review examiner determined that the claimant had not shown that her separation was for good cause attributable to the employer and, thus, had not met her burden, under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision, as well as the claimant's appeal, we remanded the case back to the review examiner to take additional evidence.

Thereafter, the review examiner conducted a remand hearing, which both parties attended, and issued her consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the consolidated findings.

The issue before the Board is whether the claimant, who concededly resigned from her job with this employer to take more hours from another employer that paid a higher hourly wage but subsequently laid her off, ought to experience a constructive deduction rather than outright disqualification from claims for unemployment benefits filed subsequent to that layoff.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The claimant worked part-time as a homemaker at the employer's home care agency from May 2007 until she became separated from her employment on January 17, 2008.
2. The claimant resigned from her employment.
3. The claimant had previously worked part-time for a computer service company (hereinafter referred to as [other employer]).
4. The claimant worked for [other employer] from January 2007 through May 2007 at which time [other employer] elected to outsource its work.
5. The claimant began working for the instant employer when [other employer] laid her off.
6. In September 2007, [other employer] contacted the claimant and asked her if she would work in another department.
7. The [other employer] offer was for part-time work that the claimant could perform at her home.
8. The claimant accepted the part-time offer from [other employer] and worked for [other employer] beginning on September 17, 2007.
9. The claimant was paid biweekly from both employers.
10. The claimant continued to work about 10 hours per week for the instant employer while she was also working for [other employer].
11. The claimant typically worked from 8:00 a.m. – 1:00 p.m. for the instant employer and worked afternoon and evening hours for [other employer].

12. The claimant worked the following hours for the instant employer from October 2007 – January 2008:

Pay Period for 2 weeks ending each week	Hours worked each week	Gross Pay each week
10/19/07	10 hours per week	\$220.00
11/2/07	8.5 hours per week	\$187.00
11/16/07	16.25 hours per week	\$357.50
11/30/07	10.5 hours per week	\$231.00
12/14/07	8.5 hours per week	\$187.00
12/28/07	7.25 hours per week	\$159.50
1/11/08	8.75 hours per week	\$209.00
1/25/08	10.5 hours per week	\$115.00

13. The claimant worked the following hours for [other employer] from October 2007 – January 2008:

Pay Period for 2 weeks ending each week	Hours worked each week	Gross Pay each week
10/15/07	13 hours per week	\$312.00
10/30/07	23.5 hours per week	\$564.00
11/15/07	40 hours per week	\$960.00
11/30/07	21.5 hours per week	\$432.00
12/14/07	did not work	
12/30/07	27 hours per week	\$648.00
1/15/08	18 hours per week	\$432.00
1/30/08	27.5 hours per week	\$654.00

14. In December 2007, [other employer] asked the claimant if she would be interested in taking morning hours.

15. [Other employer] asked the claimant to be available in the morning because often times computer parts needed to be ordered in the morning to be available to customers in the afternoon.

16. The claimant hoped that by taking the morning hours she would get more hours from [other employer].

17. [Other employer] did not promise the claimant a full-time position or offer her full-time work.

18. The instant employer paid the claimant \$11.00 per hour.

19. [Other employer] paid the claimant \$12.00 per hour.

20. The claimant had not complained to her employer about any work-related conditions prior to submitting her resignation.

21. The claimant was not in danger of being discharged for any reason.

22. The employer had work available for the claimant at the time she resigned.

23. The claimant traveled about 38.6 miles per week to work for the instant employer. The claimant estimated that she saved approximately \$36.50 each pay period when she could work from home for [other employer] instead of traveling to the instant employer's workplace.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

The review examiner denied benefits after analyzing the claimant's separation under G.L. c. 151A, § 25(e)(1), which provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for ... the period of unemployment next ensuing ... after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent....

Under G.L. c. 151A, § 25(e)(1), it is the claimant's burden to establish that her separation was for good cause attributable to the employer. The review examiner concluded that the claimant had not met her burden under this section of the law. We remanded the case to take additional evidence regarding the hours the claimant worked at, and earnings she received from, both the instant employer and her other employer, in order to determine whether the job she quit was her primary or secondary employment.

The claimant resigned from this employer because she had been offered additional part-time hours from another part-time employer for whom she also had been working. The other employer's position was more desirable. It paid the claimant one dollar more per hour; the claimant could work from home, saving time and money on commuting expenses; and the work was in her chosen profession. While all of these are sound reasons to prefer the other job over her work for this employer, they do not constitute good cause attributable to this employer, under G.L. c. 151A, § 25(e)(1).

In our view, however, the claimant is not disqualified from receiving all unemployment benefits for having quit this employer's job. The claimant became separated from the other employer in March, 2008. As the review examiner's findings provide, the claimant worked more hours (25 per week on average, versus 10 per week over the period from October, 2007 to January, 2008) and earned more money (\$4002 versus \$1665 over the same period) in her work with the other employer than with this employer. On these facts, we conclude that the other employer was the claimant's primary employer, while this employer was her secondary employer.

Therefore, because she was subsequently separated from the other employer, if that separation was in itself a non-disqualifying one, then she ought not to be subject to a complete disqualification from benefits, but rather only to a constructive deduction.

430 CMR 4.73 defines "constructive deduction" as:

The amount of remuneration that would have been deducted from the claimant's weekly benefit amount under M.G.L. c. 151A, § 29(b) if the claimant had continued to be employed on a full-time basis.

430 CMR 4.76 instructs, in relevant part:

The claimant will be subject to a constructive deduction from his/her weekly benefit amount, as calculated in 430 CMR 4.78, if he or she leaves subsidiary part-time work either prior to or after the establishment of an eligible claim for unemployment benefits or leaves newly obtained part-time work obtained within the benefit year of the claim for any reason which would result in a disqualification from benefits under M.G.L. c. 151A, § 25(e).

General Laws c. 151A, § 29(b), provides, in relevant part:

An individual in partial unemployment and otherwise eligible for benefits shall be paid the difference between his aggregate remuneration with respect to each week of partial unemployment and the weekly benefit rate to which he would have been entitled if totally unemployed; provided however, that earnings up to one-third of his weekly benefit rate shall be disregarded.... Such partial benefit amount shall be rounded to the next lower full dollar amount if it includes a fractional part of a dollar.

Applying these provisions of law to the facts of this case, we conclude as a matter of law that the claimant is not entitled to receive benefits for her separation from this part-time employer; and that a constructive deduction should be imposed on any benefits for which she would otherwise be eligible, based on her subsequent separation from the new, primary employer.

The review examiner's decision is reversed. The claimant is not subject to an outright disqualification based on her separation from the instant employer. However, any benefits to which she may otherwise be entitled because of her subsequent separation from her primary employer are subject to this constructive deduction.

The DUA is instructed to investigate the claimant's separation from her primary employer and determine whether the claimant is entitled to benefits based on that separation. If so, a constructive deduction should be applied to any such benefits, based on the claimant's separation from the instant employer.

BOSTON, MASSACHUSETTS**DATE OF MAILING - April 1, 2010**

/s/

John A. King, Esq.

Chairman

/s/

Sandor J. Zapolin

Member

/s/

Stephen M. Linsky, Esq.

Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT**(See Section 42, Chapter 151A, General Laws Enclosed)****LAST DAY TO FILE AN APPEAL IN COURT – May 3, 2010**

JPC/ jv